93-910

No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1993

KENNETH F. BONNY, *et al.*,

Petitioners,

v.

THE SOCIETY OF LLOYD'S, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

A. Whether a prospective waiver of United States securities law remedies pursuant to forum selection and choice of law clauses is presumptively valid where the formation of the underlying investment contracts involves only insignificant and attenuated contacts with a foreign country.

B. Whether the holding in *Scherk v. Alberto-Culver Co.* prevents United States investors from maintaining actions in the United States for federal securities law violations, where the underlying investment contracts contain clauses which operate in tandem to deprive the investors of substantive rights afforded by the United States securities laws.

C. Whether the purchase of securities by United States investors, pursuant to solicitations within the United States by compensated United States sales agents, constitutes a "truly international" agreement under the holding of *Scherk v. Alberto-Culver Co.*

D. Whether forum selection and choice of law clauses may be enforced in a manner which insulates United States promoters who are not parties to the clauses from suits under United States securities laws by United States investors.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

Appellants

Kenneth F. Bonny
Francesca B. Bonny
Robert D. Flesvig

Appellees

The Society of Lloyd's
Harris Bank Glencoe-Northbrook, N.A.
Harris Trust and Savings Bank
Bank of Montreal
Northfield Venture, Inc.
Robert B. King
Alan J. Hunken
Lime Street Underwriting Agencies, Ltd.
Robin C. Kingsley
Robert C. Hallam
Patrick M. Corbett
Bankside Underwriting Agencies, Ltd.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Kenneth F. Bonny, Francesca B. Bonny and Robert D. Flesvig respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered August 5, 1993.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals affirming the district court, with directions, (Appendix A) is reported at 2 F.3d 156 (7th Cir. 1993)

The order of the district court dated August 9, 1993, implementing the direction of the court of appeals, (Appendix B) is not reported.

The order of the district court dated June 26, 1992 *sua sponte* dismissing certain defendants, (Appendix C) is not reported.

The opinion and order of the district court dated May 29, 1992, accepting the magistrate judge's recommendation and dismissing the amended complaint, (Appendix D) is not reported.

The report and recommendation of the magistrate judge, dated April 20, 1992, recommending dismissal of the amended complaint, (Appendix E) is not reported.

The opinion of the district court dated February 24, 1992, rejecting the magistrate judge's recommendation, and denying the motion for preliminary injunction, (Appendix F) is reported at 784 F. Supp. 1350 (N.D. Ill. 1992).

The report and recommendation of the magistrate judge to the district court dated September 26, 1991, recommending issuance of a preliminary injunction, (Appendix G) was attached as an appendix to the opinion of the district court dated February 24, 1992, and is reported therewith at 784 F. Supp. 1350 (N.D. Ill. 1992).

JURISDICTION

Jurisdiction in the district court was based on 28 U.S.C. §1331, in that the action arose under the laws of the United States, to-wit §§12(1) and 12(2) of the Securities Act of 1933, 15 U.S.C. 77*l*(1) and (2), and §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78*j*(b), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. §240.10b-5 promulgated thereunder, and §1964(a) of the RICO provisions of the Organized Crime Control Act of 1970, 18 U.S.C. §§1961-68; and under 28 U.S.C. §1331, pursuant to 12 U.S.C. §632, in that a corporation organized under

the laws of the United States is a party, and the action arose out of transactions involving international banking; and upon principles of pendent and ancillary jurisdiction.

Jursidiction in the appellate court was based on 28 U.S.C. §1291.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). The judgment sought to be reviewed was entered by the United States Court of Appeals for the Seventh Circuit on August 5, 1993. An order of this Court was entered on October 21, 1993, on motion of petitioners, extending the time for filing a petition for a writ of certiorari to and including December 8, 1993.

STATUTES INVOLVED

Securities Act of 1933 §14 (15 U.S.C. §77n):

> **§77n. Contrary stipulations void**
>
> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

Securities Exchange Act of 1934, §29(a) (15 U.S.C. §78cc(a)):

> **§78cc. Validity of contracts**
>
> **(a) Waiver provisions.** Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

STATEMENT OF THE CASE

A. The Parties

The petitioners, Kenneth Bonny, Francesca Bonny and Robert Flesvig ("Flesvig"), are three individuals residing in the United States. Kenneth and Francesca Bonny are husband and wife. The petitioners were initially sought out and solicited by respondents Robert King ("King") and Alan Hunken ("Hunken"), who were United States citizens doing business in the United States, and who proposed to them that they invest in the

insurance market commonly known as Lloyd's. King and Hunken sometimes operated under the aegis of Northfield Venure, Inc., ("Northfield") an Illinois corporation in which each of them held an ownership interest. (King, Hunken and Northfield are referred to collectively as the "Local Defendants.")

The Society of Lloyd's ("Lloyd's") operates one of the oldest and largest insurance markets in the world. One invests in Lloyd's, and thereby obtains the right to participate in Lloyd's insurance-writing syndicates, by becoming an Underwriting Member, colloquially known as a "Name." Lloyd's provides facilities for its members to engage in the insurance business and it regulates the activities that are undertaken in its facilities. Lloyd's oversees the raising of capital by regulating all aspects of membership in Lloyd's.

Names at Lloyd's are required by Lloyd's to designate an agent at Lloyd's to handle their affairs at Lloyd's. This agent is known as a "Members' Agent." Lime Street Underwriting Agencies, Ltd. ("Lime Street") was the petitioners' Members' Agent at Lloyd's. Petitioners were introduced to Lime Street by the Local Defendants, who were compensated by Lime Street for providing the introduction. Robin Kingsley ("Kingsley"), Robert Hallam ("Hallam") and Patrick Corbett ("Corbett") were executive employees of Lime Street, and members of its Board of Directors. (Lime Street, Kingsley, Hallam and Corbett are referred to collectively as the "Lime Street Defendants.")

Harris Bank Glencoe-Northbrook, N.A., Harris Trust and Savings Bank and Bank of Montreal were the secured party, issuing bank and confirming bank, respectively, of certain irrevocable letters of credit that petitioners were required by Lloyd's to deposit, in favor of Lloyd's, which could be drawn by Lloyd's in the event the syndicates' cash calls to Names were not paid. Kenneth Bonny's and Robert Flesvig's letters have been completely drawn since this action was filed. (These banks are collectively referred to as the "Bank Defendants.") The Bank Defendants were necessary parties because of their involvement with the letters of credit, but no wrongdoing on the part of the Bank Defendants was alleged below.

Bankside Underwriting Agencies, Ltd. ("Bankside") is a Members' Agent at Lloyd's which took over the affairs of the petitioners after Lime Street went out of business in 1991. Bankside was a necessary party because of its having taken over the affairs of Lime Street but no wrongdoing on the part of Bankside was alleged below.

B. The petitioners' investment in Lloyd's.

Names at Lloyd's have unlimited liability for their share of syndicate losses.

The petitioners allege that in order to induce them to invest in, and stay in, Lloyd's, the Local Defendants, the Lime Street Defendants and Lloyd's made a host of misrepresentations to them and failed to disclose a host of material facts and risk factors concerning investment in Lloyd's generally and concerning Lime Street particularly.

The Local Defendants introduced prospective Names to Lime Street, explained the operation of Lloyd's, acted as a clearinghouse for information about Lloyd's and Lime Street, assisted prospective Names in meeting the requirements for admission to Lloyd's, and assisted with the paperwork involved in making application to Lloyd's.

Lloyd's was fully aware of the activities of these American recruiters, and both required and received reports from the Local Defendants concerning the recruitment and their compensation.

It took the petitioners several months to become Names, and virtually all of the pre-investment activity occured in the United States. They were required to submit certified documentation of their net worth and to establish the letters of credit in favor of Lloyd's. After that they travelled to England for a brief interview and to sign the final papers.

Flesvig first invested in Lloyd's as of January 1, 1987, Kenneth Bonny as of January 1, 1988, and Francesca Bonny as of January 1, 1990. Flesvig and Kenneth Bonny experienced modest losses which were reported to them in mid-1990, and in mid-1991 they and Francesca Bonny experienced devastating losses, which, in the aggregate, annihilated their entire personal

wealth. On August 30, 1991, the Bonnys filed suit. Flesvig joined as a plaintiff on November 4, 1991.

C. The choice of forum and choice of law clauses.

The documents which Names must execute when they first invest in Lloyd's include clauses providing that disputes between Names and Lloyd's will be litigated in English courts under English law, and that disputes between Names and Members' Agents will be arbitrated in England under English law, by an arbitrator appointed, in default of agreement, by the Chairman or a Deputy Chairman of Lloyd's.

Petitioners were not told by any defendant that under English law Lloyd's enjoys exemption from all liability for damages (except certain special kinds of actions not relevant to this case), unless bad faith is proved, and that both Lloyd's and Lime Street are "exempt persons" under the English securities laws, and therefore are exempt from private causes of action by investors.

D. Proceedings below.

The petitioners requested at the outset that a preliminary injunction issue to bar Lloyd's from drawing on the petitioners' letters of credit. The hearing on the preliminary injunction was referred to a magistrate judge. Lloyd's argued that the choice of law and choice of forum clauses required the dispute to be litigated in England under English law. Plaintiffs argued that these clauses would operate in tandem as an impermissible waiver of their substantive rights under the United States securities laws and were therefore void under the anti-waiver provisions of the 1933 and 1934 Acts. 15 U.S.C. § 77n; 15 U.S.C. § 78 cc(a). After three days of hearings related to the application and effect of English law, the magistrate judge recommended that the injunction issue. Appendix G.

Lloyd's, the Lime Street Defendants, Bankside and the Bank Defendants filed objections to this recommendation. Subsequently, the district court rejected the Report and Recommendation without a hearing, and denied plaintiffs' motion for a preliminary injunction. Appendix F. The decision to deny the preliminary injunction was based on the conclusion that the

Northern District of Illinois was not the proper forum for the trial of the plaintiffs' claims, and that the plaintiffs had therefore failed to show a likelihood of success on the merits of their claims. Petitioners appealed from that ruling.

Lloyd's, the Lime Street Defendants and Bankside had also filed motions to dismiss based in part on the choice of forum and choice of law clauses. These motions were also referred to the magistrate judge who recommended, based on the district court's earlier decision on the motion for preliminary injunction, that the motions to dismiss be granted. Appendix E. The district court accepted the recommendation and issued a final judgment granting motions to dismiss. Appendix D.

After its ruling on the motions to dismiss, the district court entered a post-judgment ruling to the effect that the court had contemporaneously dismissed all the remaining defendants *sua sponte*, citing *Rosser v. Chrysler Corp.*, 864 F.2d 1299, 1304 (7th Cir. 1988). Appendix C. Although this order contained no findings, apparently the district court determined that the nonmoving defendants were in a position similar to that of the moving defendants or that the claims against all the defendants were integrally related. The non-moving defendants were the Bank Defendants and Local Defendants. The petitioners appealed from these rulings as well, and the appeals were consolidated by the Seventh Circuit.

The Seventh Circuit affirmed the district court, except as to its dismissal of the Local Defendants. As to this issue, the Seventh Circuit stated that "we thus direct that the district court to [sic] qualify its dismissal of the entire case on the condition that the local defendant agree to appear voluntarily in England if suit is refiled there." Appendix A, p. 13a.

The district court did so qualify its decision, in its order of August 9, 1993. Appendix B.

REASONS FOR GRANTING THE PETITION

I.

The interpretations of *Scherk* given by the Courts of Appeals for the Second, Seventh and Tenth Circuits are in conflict.

In *Riley v. Kingsley Underwriting Agencies, Ltd., et al.*, 969 F.2d 953 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 658 (1992), and in *Roby et al. v. Corporation of Lloyd's et al.*, 996 F.2d 1353 (2d Cir. 1993) *cert. denied*, 62 U.S.L.W. 3166 (1993), the Courts of Appeals for the Tenth and Second Circuits considered the same choice of forum and choice of law clauses that are under consideration here. Although both cases held that the clauses must be enforced, and both relied on *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), they arrived at their conclusions by such contrary pathways that laying the two cases side by side shows that the principles announced in *Scherk* are not well understood, and need clarification.

The Tenth Circuit's interpretation of *Scherk* is stated in one key portion of the *Riley* opinion:

> Riley will not be deprived of his day in court. He may, though, have to structure his case differently than if proceeding in the federal district court. The fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement, provided that the law of the chosen forum is not unfair. [citation omitted].

969 F.2d at 958.

Thus, the Tenth Circuit's test under *Scherk* may be described as an "adequate remedy" test: If there is a remedy the court feels is adequate in the foreign forum, then the clauses will be upheld.

The Second Circuit, in deciding *Roby* eleven months later, was not comfortable with the *Riley* test, and stated that "there is a serious question whether United States public policy has been subverted by the Lloyd's clauses," observing that "[t]he

Supreme Court in *The Bremen* wrote, '[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which the suit is brought.' 407 U.S. at 15." 996 F.2d at 1363-64.

Ultimately upholding the clauses, the Second Circuit added another component to the test, which may be summarized as "adequate deterrence."

> We are satisfied that the Roby Names have several adequate remedies in England to vindicate their substantive rights, but also that in *this* case the policies of ensuring full and fair disclosure and deterring the exploitation of United States investors have not been subverted.

Id. at 1365.

With respect to fraud and misrepresentation, the Second Circuit held that "available remedies and potential damages recoveries suffice to deter deception of American investors." *Id.* at 1365. With respect to the United States policy favoring disclosure by issuers to investors, the Second Circuit said "English law in this case provides Lloyd's entities with an adequate inducement to disclose material information to American investors." *Id.* at 1366. Summing up, the Second Circuit said "[t]he specter of liability for breach of contract should act as an adequate deterrent to the exploitation of American investors." *Id.* at 1366.

Thus the Second Circuit has added "adequate deterrence" to "adequate remedy" as a requirement for upholding these clauses, leaving the law under *Scherk* murkier than ever. Moreover, "adequate deterrence" as a test begs the question, because it looks backwards in time to the state of mind of the wrongdoer before the moment of the wrongdoing. If the deterrence were in fact adequate, the *Roby* Names would not have been in court seeking damages.

While the Tenth Circuit is clear that "adequate remedy" is the necessary and sufficient condition of upholding the clauses, and the Second Circuit is no less clear that it is not, but must be supplemented with "adequate deterrence," the Seventh Circuit

has unharmoniously blended the two tests, without stating whether either, or both, constitute the necessary and sufficient condition. At one place the Seventh Circuit says "we are satisfied that several remedies in England vindicate plaintiffs' substantive rights. . . " Appendix A, p. 9a, while later the court states, "[w]e conclude that the available remedies and potential damage recoveries suffice to deter deception of American investors and to induce the disclosure of material information to investors." Appendix A, p. 11a.

As the law under *Scherk* has unfolded so variously in these three circuits, this Court should resolve the conflict and clarify it.

II.

The principles of *Scherk* should not be extended to immunize United States promoters selling securities to United States investors within United States territory from the application of United States Securities laws.

This case differs from *Riley* and *Roby* in that three of the defendants in this case are local promoters of Lloyd's investments, and were compensated therefor.

The gravemen of the complaint is the acts and omissions which occured in the United States long before the petitioners went to England to enroll formally as Names. The capital-raising program at Lloyd's included, as an integral part, the use of paid local agents to initiate contact and solicitation within the United States.

In *Riley*, the court stated, as the first of its three reasons for upholding the clauses, that "the parties' undertaking is truly international in character. . . . ." 969 F.2d at 956. The phrase "truly international" was first used in *Scherk*, and any elucidation of the meaning of the phrase must begin with a study of *Scherk*.

It is an error to assume that every contract not formed entirely within the United States is necessarily "truly international." In *Scherk* this Court acknowledged that "situations may arise where the contacts with foreign countries are so insignificant or

attenuated . . ." that the term "truly international" would not be appropriate, and said that judicial response to such situations "can and should await future litigation in concrete cases." 417 U.S. at 517, n.11. This is just such a case.

The Supreme Court identified the factors that led it to label the contract in *Scherk* "a truly international agreement." *Id.* at 515. These were the facts that (1) Alberto-Culver was an American company, Scherk a German citizen, and Scherk's companies were organized under German and Liechtenstein law; (2) negotiations took place in the United States, England and Germany, contract signing was in Austria and closing was in Switzerland; (3) negotiations involved consultations with legal and trademark experts from each of the foregoing countries; and (4) the subject matter of the contract concerned the sale of business enterprises organized under laws of European countries, primarily situated in European countries, and directed to European markets. *Id.* at 515. The instant case, although characterized as "truly international" by the District Judge, in fact involves passive United States investors whose road into Lloyd's was paved entirely in the United States, and whose sole "international" aspect was one *pro forma* trip to England to sign up.

In addition, the two parties in *Scherk* were "a powerful German operator and . . . an American business surrounded and protected by lawyers and experts." *Id.* at 525-26. In the instant case, Lloyd's is certainly a powerful English operator, but the Amended Complaint shows that appellants are ordinary passive investors, not surrounded or protected by lawyers or experts.

Finally, the contract in *Scherk* was extensively negotiated. The negotiation, signing and closing took place in five countries over a period of nearly two years. *Id.* at 508. In the instant case, the contracts were all forms prepared by Lloyd's and presented to the plaintiffs with terms that were non-negotiable.

Turning back to *Riley*, it is difficult to discern how the court arrived at the conclusion that the contract in that case was "truly international," because the court does not tell us. The court noted as its second and third reasons, that "all parties, save Riley and FirstBank, are British citizens or entities," and "virtually all activities giving rise to the suggested claims occurred in

England." 969 F.2d at 956. Yet it is difficult to determine whether the second and third factors are part of what led the *Riley* court to determine that the contract was "truly international" or whether they are separate factors the court considered, apart from whether the contract was "truly international" or not. If they were part of what led the Court to characterize the contracts as "truly international," then the Court's analysis is of two kinds: parties and activities. If that is the correct way to analyze "truly international" then the result in this case must be different, because three of the defendants are United States citizens or entities, and all of the significant activities giving rise to the claim occurred in the United States.

If on the other hand, a determination of "truly international" is not to be arrived at by considering parties and activities, but is a separate and independent analysis, then the *Riley* court leaves us with no clue as to how it arrived at its conclusion.

The Second Circuit, apparently sensing this ambiguity in *Riley*, noted that "while we agree with the ultimate result in *Riley*, we are reluctant to interpret the Supreme Court's precedent quite so broadly." *Roby*, 996 F.2d at 1362. The *Roby* Court carefully ignored the term "truly international" and based its decision on whether the clauses were "unreasonable" under the principles of *The Bremen v. Zapata Offshore Co.*, 407 U.S. 1 (1972).

In the instant case, the district court based its decision squarely on a finding that the contracts were "truly international" under *Scherk*, calling this "the key factor." (Appendix F, p. 7f.) The Seventh Circuit, upholding the district court, cited this phrase with approval, (Appendix A, p. 7a.) and then proceeded to consider whether the contracts were unreasonable under *The Bremen*, steering a path mid-way between that of the Tenth Circuit and that of the Second Circuit. But no court has said what "truly international" means. As a result, in this case, it has come to include a situation where an Illinois promoter of securities solicits an Illinois investor in Illinois.

The Seventh Circuit's extension of *Scherk* to the facts of this case creates an irrational and untenable distinction, immunizing a capital-raising scheme which employs local

promoters for acts and omissions committed within the United States merely because the issuers and controlling persons are located in a foreign country. Such conduct would not be immunized if the issuers and controlling persons were not foreign.

III.

The Seventh Circuit has nullified the anti-waiver provisions of the Securities Act of 1933.

No court considering the Lloyd's clauses has gone as far as the Seventh Circuit, which freely acknowledges the effect on the anti-waiver provisions of the Securities Act of 1933 which those clauses entail. With breathtaking candor, the court states:

> It is true that enforcement of the Lloyd's clauses will deprive plaintiffs of their specific rights under §12(1) and §12(2) of the Securities and Exchange [sic] Act of 1933.

Appendix A, p. 11a. The Seventh Circuit has here at least stated openly what the Tenth and Second Circuits do not: that enforcement of the Lloyd's clauses annuls the anti-waiver provisions of the Securities Act of 1933, 15 U.S.C. §77n, and, *a fortiori*, causes of action under Sections 12(1) and 12(2) of the Act.

The magistrate judge below, who recommeded that a preliminary injunction issue on behalf of the petitioners, perceived this as well, and while acknowledging the strong interests in favor of choice of forum clauses, demonstrated the proper deference due an act of Congress, stating:

> This court, however, concludes that these interests must yield to Congress' explicit directive that a contractual provision which has the effect of binding plaintiffs to waive compliance with the 1933 Securities Act is void.

Appendix G, p. 12g.

Seeking to avoid this clash with an act of Congress, the Tenth Circuit suggested that Riley "structure his case differently." *Riley*, 969 F.2d at 958. The Second Circuit in turn searched the Members' Agent's Agreement for disclosure requirements

resembling those of the 1933 Act. *Roby*, 996 F.2d at 1366. The Seventh Circuit searched the criminal law of England, and satisfied itself that it provided a potential avenue of redress for the *Bonny* plaintiffs. Appendix A, p. 10a.

But in so doing, all of these courts have ignored this Court's warning that there is a limit to the policy favoring choice of forum and choice of law clauses. This Court has plainly stated:

> We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637, n.19.

Similarly, in a securities law context, this Court specifically identified the securities seller's burden of proving lack of scienter in a proceeding under §12(2) of the 1933 Act as a "substantive provision" which cannot be waived. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989).

In the face of such clear language in the 1933 Act, and in this Court's decisions, the Seventh Circuit had no sound basis to sweep away the petitioners' claims under the 1933 Act.

IV.

The Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

The Seventh Circuit was clearly concerned by the role the Local Defendants played in bringing the petitioners into Lloyd's. The petitioners had argued that "the district court's ruling is unconscionable in that it requires an Illinois plaintiff suing an Illinois defendant for acts which occurred in Illinois to bring its claim in England under English law." (Appendix A, p. 13a.)

The Seventh Circuit's remedy, however, was worse than the ailment, for it left the matter entirely in the hands of the Local

Defendants. "We thus direct that the district court to [sic] qualify its dismissal of the entire case on the condition that the local defendants agree to appear voluntarily in England if suit is refiled there." (Appendix A, p. 13a).

Now the parties are faced with a case that may or may not be dismissed. How does any party know if this case is dismissed or not? The dismissal is conditioned on a *voluntary* act by the Local Defendants, but with no direction as to when the Local Defendants are to exercise their volition. Can they wait until suit is filed in England, and then decide that they would rather be sued here?

Moreover, this conditional dismissal is itself predicated upon a *sua sponte* retroactive dismissal of the Local Defendants by the district court without its ever having held a hearing to determine such important questions such as whether they fall under the clauses contained in the contract with Lloyd's or whether they fall under those in the contract with the Members' Agents; or whether, if the Local Defendants are protected by the clauses in the Members' Agents' contract, they are also bound by the duties imposed on Members' Agents in that contract; or, if not, whether the Local Defendants had any duties at all to the petitioners under the English law that would apply.

In an effort to uphold the forum selection clauses the Seventh Circuit has fashioned a decision with no finality and which incongruously gives to those defendants who are not parties to the forum selection contracts the power to choose the forum. Petitioners have searched in vain for a legal precedent which supports this solution. This conditional affirmance of a retroactive *sua sponte* dismissal is such a departure from the accepted and usual course of judicial proceedings that it calls for an exercise of this Court's power of supervision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Chicago, Illinois
December 8, 1993

Respectfully Submitted,

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 92-1662 and 92-2771

KENNETH F. BONNY, FRANCESCA B. BONNY and ROBERT D. FLESVIG,

Plaintiffs-Appellants,

v.

THE SOCIETY OF LLOYD'S, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 5525—Charles R. Norgle, Sr., *Judge.*

ARGUED DECEMBER 4, 1992—DECIDED AUGUST 5, 1993

Before CUMMINGS and CUDAHY, *Circuit Judges*, and LAY, *Senior Circuit Judge.**

LAY, *Senior Circuit Judge.* Kenneth Bonny, Francesca Bonny and Robert Flesvig brought claims in federal district court alleging that they were fraudulently, and in violation of various federal and state securities laws, induced to become members of the Society of Lloyd's (Lloyd's) and to participate as underwriters in several insurance syndicates. Suit was brought against Lloyd's, a British

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* Hon. Donald P. Lay, of the Eighth Circuit, sitting by designation.

entity; Lime Street Underwriting Agencies Ltd, Bankside Underwriting Agencies Ltd, Robin Kingsley, Robert Hallam and Patrick Corbett, all British corporations or citizens, (collectively referred to as "Members' Agents"); Northfield Venture, Inc. and its principals Robert King and Alan Hunken, all American defendants, (collectively referred to as "Local Defendants"); Harris Bank Glencoe-Northbrook, Harris Trust & Savings Bank, and the Bank of Montreal ("Bank defendants").

On February 24, 1992, the district court denied plaintiffs' motion for preliminary injunction based upon the lack of likelihood of success on the merits due to the presumptive validity of forum selection clauses contained in the contractual agreements. The injunction sought to bar the defendants from drawing upon a letter of credit issued by Harris Bank which the plaintiffs were required to obtain as a condition of their membership. Plaintiffs appealed on March 23, 1992 (No. 92-1662).

On May 29, 1992, the district court granted Lloyd's and the Managing Agents' motions to dismiss based on contractual forum selection and arbitration clauses designating England as the forum for dispute litigation and arbitration.[1] In a clarification of this order on June 26, 1992, the district court ruled that its prior dismissal applied to *all* defendants, explaining that the non-moving local defendants were dismissed *sua sponte*. Plaintiffs thereafter appealed the order of dismissal (No. 92-2771). These two appeals were consolidated for oral argument and disposition; we now affirm the respective orders of the district court.

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[1] Because the enforcement of the clauses was dispositive, the district court did not rule on the defendants' other grounds for dismissal.

FACTS

The Society of Lloyd's operates one of the largest insurance markets in the world.[2] Individuals invest in Lloyd's and thereby obtain the right to participate in Lloyd's insurance underwriting syndicates by becoming an Underwriting Member (a "Name"). A "Managing Agent" manages the syndicate and owes a contractual duty to Names to manage their syndicates with reasonable care. Most syndicates specialize in the underwriting of a particular type of insurance. A Name decides how much he or she wishes to invest in each syndicate based on limited financial information. Many Names join more than one syndicate in order to spread their underwriting across different types of insurance or across different syndicate managements. A Name is not allowed to deal directly with Lloyd's and must designate a "Members Agent" to handle the Name's affairs. By agreement, Members' Agents owe a fiduciary duty to their Names and must act in the sole interest of their principal Name. In making decisions regarding in which syndicates to invest, Names rely to a great extent on the advice of their Members' Agents.

Each Name is responsible only for his or her share of a syndicate's losses, but liability is unlimited for that share. Similarly, each Managing Agent is independent of every other agent, responsible only for his or her own syndicate.

To become a Name, a candidate must prove financial means. The candidate must also deposit a specified sum via an irrevocable letter of credit issued by a Lloyd's approved bank in favor of Lloyd's. This serves as security and allows the Name to continue underwriting. When insurance claims exceed premium available, Lloyd's makes "cash calls" upon the Names responsible for those claims.

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[2] Lloyd's provides facilities for its members to engage in the insurance business and regulates the activities that are undertaken in its facilities. It is a market somewhat analogous to the New York Stock Exchange.

If the cash calls are not paid, the Name's security can be used for that purpose.

Northfield, King and Hunken are agents of Lloyd's and Lime Street[3] operating in the United States. Kenneth Bonny was solicited by King in Illinois to invest in Lloyd's. Francesca Bonny invested based on the representations made to her husband. Robert Flesvig, who joined the suit in the Amended Complaint, was solicited by Hunken. King and Hunken introduced the Plaintiffs to Lime Street, the designated "Members' Agent." Lime Street compensated King and Hunken for the introduction.

Plaintiffs traveled to England and executed a General Undertaking for Membership that included both forum selection and choice of law clauses.[4] They also signed a Members' Agent Agreement providing that disputes between Names and Members' Agents will be arbitrated in England under English law.

To secure their obligations to Lloyd's, each of the plaintiffs issued irrevocable letters of credit in favor of the Society and Council of Lloyd's.[5] These letters were secured, issued and confirmed by the banks which are named de-

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[3] Lime Street Underwriting is a Members' Agent affiliated with Lloyd's.

[4] The General Undertaking provides in relevant part:

> 2.1 The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.
>
> 2.2 Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's . . . .

[5] Kenneth Bonny's letter is in the amount of 105,000 pounds; Francesca Bonny's letter is in the amount of 150,000 pounds and Robert Flesvig's letter is in the amount of 110,000 pounds.

fendants. The syndicates in which the plaintiffs participated ultimately experienced large losses resulting in calls in excess of 300,000 pounds.[6]

Plaintiffs claim that the non-bank defendants, in order to induce them into investing in and remaining members of Lloyd's, failed to disclose material facts and risk factors concerning investment in Lloyd's, particularly through Lime Street.[7] They brought suit under Section 12(1) and 12(2) of the Securities Act of 1933 and under Section 10(b) of the 1934 Securities and Exchange Act of 1933. Plaintiffs also allege RICO violations and causes of action in common law for fraud, negligence and breaches of duty.

DISCUSSION

I. *Enforceability of the forum selection clause*

The enforceability of forum selection and choice of law provisions are questions of law which we review de novo. *Hugel v. Corp. of Lloyd's*, No. 92-2240, slip op. (July 8, 1993); *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 375 (7th Cir. 1990); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 956 (10th Cir.), *cert. denied*, 113 S. Ct. 658 (1992).

Plaintiffs claim that the district court erred in dismissing their amended complaint. They argue that the forum

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[6] By letters from Lloyd's dated July 9, 1991, plaintiffs were informed of their net underwriting position: Kenneth Bonny's total loss was 293,791.65 pounds; Francesca Bonny's total loss was 45,405 pounds; and Robert Flesvig's total loss was 213,986.54 pounds.

[7] They claim that they were not told that their investments were highly risky, that they were put by their Members' Agent in highly speculative syndicates, that those syndicates were operating at the high-risk edge of the insurance industry, and that years of high-risk conduct permitted by Lloyd's would lead to enormous losses. Plaintiffs also claim that although Lime Street promised to put them into a "balanced and diversified spread of syndicates to minimize risk," plaintiffs were in fact put into some of the worst performing syndicates at Lloyd's.

selection and choice of law clauses should be held void because together they violate public policy by prospectively waiving plaintiffs' Securities Act remedies.[8] Plaintiffs rely on *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1984), where the Supreme Court stated in dicta that forum selection and choice of law provisions which operate as prospective waivers of statutory antitrust claims would not be enforced as against public policy. *Id.* at 637 n.19. Plaintiffs argue that they are being deprived of all substantive rights under the federal securities laws and should therefore be relieved of their agreement on public policy grounds.

The enforceability of forum selection clauses in international agreements is governed by the Supreme Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).[9] In enforcing a forum selection clause in a contract between Zapata, an American corporation, and Unteweser, a German corporation, the Court held that forum selection clauses are "prima facie valid and should be enforced

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[8] The anti-waiver provisions of the United States' securities laws provide as follows:

> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

15 U.S.C. § 77n. (1982).

> Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

15 U.S.C. § 78cc(a) (1982).

[9] Plaintiffs initially attempt to characterize their agreement with Lloyd's as a domestic securities transaction. There is no question that the transaction involved here is truly international. The plaintiffs contracted with Lloyd's, a distinctively British entity, to become members of an insurance market that underwrites insurance worldwide. The Agreements were executed in London and the plaintiffs traveled to England for that purpose. All but three of the non-bank defendants in the case are British.

unless enforcement is shown by the resisting party to be unreasonable under the circumstances." *Id.* at 10. The Court reasoned that:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

Id. at 9. Indeed, "[t]he elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *Id.* at 13-14.

In *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1973), the Court enforced an arbitration agreement in a securities case arising out of an international contract. The Court stated:

> [U]ncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

Id. at 516. In *Scherk*, the Court found it significant that the agreement was "truly international." *Id.* at 515. Similarly, in *Mitsubishi Motors*, 473 U.S. at 629, the Court stated that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context." *Id.*

The presumptive validity of a forum selection clause can be overcome if the resisting party can show it is "unreasonable under the circumstances." *M/S Bremen*, 407 U.S. at 10. The Supreme Court has construed this exception narrowly: forum selection and choice of law clauses are "unreasonable" (1) if their incorporation into the contract was the result of fraud, undue influence or overweening bargaining power, *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1528 (1991); *M/S Bremen*, 407 U.S. at 12-13; (2) if the selected forum is so "gravely difficult and inconvenient that [the complaining party] will for all practical purposes be deprived of its day in court." *Id.* at 18; or (3) if enforcement of the clauses would contravene a strong public policy of the forum in which the suit is brought, declared by statute or judicial decision. *Id.* at 15.

Plaintiffs have not met their burden in proving the clauses unreasonable. There is no evidence in the record that the forum selection clause was tainted by fraud, undue influence or overweening bargaining power.[10] Moreover, plaintiffs do not argue that they would suffer severe physical and financial hardship by being compelled to litigate in England.[11]

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[10] Plaintiffs contended at oral argument that the forum selection and choice of law clauses were induced by fraud. They claim that defendant did not disclose that under British law, Lloyd's enjoys immunity from certain causes of action for damages and that Lloyd's and Lime Street are "exempt" persons under the English securities laws and are therefore exempt from the provisions that protect investors. We need not address the accuracy of plaintiffs recitation of English law at this juncture. We note only that a party to a contract has an obligation to read its provisions. It is a fundamental principle of contract law that a person who signs a contract is presumed to know its terms and consents to be bound by them. 3 A. Corbin, *Corbin on Contracts* 607 (1989). Nothing excuses the plaintiffs for not being aware of the substantive provisions of English law that the forum selection clause incorporates into their agreement.

[11] According to the Affidavit of Kenneth Bonny, submitted in support of his motion for an Emergency Injunction Pending Appeal,

(Footnote continued on following page)

As to the third factor, we have serious concerns that Lloyd's clauses operate as a prospective waiver of statutory remedies for securities violations. By including the anti-waiver provisions in the securities laws, Congress made clear that the public policy of these laws not be thwarted. *Cf. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631 n.19 (1985) (stating that prospective waivers of statutory antitrust remedies would likely be voidable as contrary to public policy). The complaint in this case asserts that defendants violated provisions of the 1933 Securities Acts in dealing with American citizens. To allow Lloyd's to avoid liability for putative violations of the 1933 Act would contravene important American policies unless remedies available in the selected forum do not subvert the public policy of that Act. This is the fundamental question we face here.

In the present case, we are satisfied that several remedies in England vindicate plaintiffs' substantive rights while not subverting the United States' policies of insuring full and fair disclosure by issuers and deterring the exploitation of United States investors. *See Roby v. Corporation of Lloyd's*, No. 92-9032, 1993 WL 184568, at *5, 6 (2d Cir. June 2, 1993). The record makes clear that English law affords plaintiffs a cause of action for fraud similar

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[11] *continued*

Mr. Bonny's letter of credit has at this point been completely drawn down and as a result he presently suffers financial hardship. However, there is no evidence that at the time of executing the General Undertaking for Membership, Mr. Bonny suffered severe physical or financial hardship such that an agreement to litigate all disputes in England would be deemed fundamentally unfair. Although Mr. Bonny's current financial situation is quite bleak, a party's financial status at any given time in the course of litigation cannot be the basis for enforcing or not enforcing a valid forum selection clause. Because this court denied plaintiffs' motion to enjoin Lloyd's from drawing on the letters of credit pending appeal, Lloyd's was well within its rights in doing so and its actions have no effect on our determination of the enforceability of the forum selection clause.

to that available for the claims they have brought under Rule 10b-5. Plaintiffs can bring claims for common law fraud and rescission of their contract made in reliance on the misrepresentation. In addition, several of the specific Lloyd's agreements require disclosure of material information to American investors with failure to do so giving rise to liability for breach of contract.[12] Moreover, under their contracts, Member's Agents owe a fiduciary duty to Names which provides a further basis for suit. Finally, Section 47 of the Financial Services Act creates penalties for misleading statements or omissions made knowingly or recklessly. Although Section 47 provides criminal sanctions, injured persons can obtain compensation pursuant to Section 61 of the Act, which permits the court, upon the application of the Secretary of State, to order injunctions to restrain violations of § 47 and to make remedial orders. While Section 61 does not create a private right of action, upon a finding of criminal liability under § 47, plaintiffs could potentially receive some compensation for their injuries. More importantly, such criminal penalties serve as an important deterrent against exploitation of United States investors.

Plaintiffs contend that the Lloyd's Act of 1982 bars them from pursuing these particular causes of action.[13]

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[12] For example, the Members' Agent's Agreement requires each Members' Agent to:

> disclose . . . in good time any information in its possession relating to any of the Contracted Syndicates, or to any syndicate which the Agent has advised the Name to join . . . which could reasonably be expected to influence the Name in deciding whether to become or remain a member of, or to increase or reduce his participation in, any such syndicate, and use its reasonable endeavours to obtain any such information.

The Managing Agent's Agreement likewise requires Managing Agents to disclose in good time relevant information to the Name or his Member's Agent.

[13] Section 14(3) of The Lloyd's Act of 1982 provides:

> Subject to subsections (1), (4) and (5) of this section, the Society shall not be liable for damages whether for negligence or other

(Footnote continued on following page)

The Lloyd's Act of 1982, however, does not grant statutory immunity in the event of bad faith. *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir.), *cert. denied*, 113 S. Ct. 658 (1992). Moreover, affidavits submitted in this case indicate that the immunity offered under the Lloyd's Act is not a bar to suit, but is rather a defense that Lloyd's must affirmatively plead. The court will not raise the defense *sua sponte* and Lloyd's has stipulated that it would not raise this defense.

We conclude that the available remedies and potential damage recoveries suffice to deter deception of American investors and to induce the disclosure of material information to investors. It is true that enforcement of the Lloyd's clauses will deprive plaintiffs of their specific rights under § 12(1) and § 12(2) of the Securities and Exchange Act of 1933. However, the fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not alone a valid basis to deny enforcement of forum selection, arbitration and choice of law clauses. In our recent opinion in *Hugel v. Corporation of Lloyds*, No. 92-2240, slip op. (7th Cir. July 8, 1993), we adopted the reasoning of the Second Circuit in rejecting a similar claim:

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[13] *continued*

tort, breach of duty or otherwise, in respect of any exercise of or omission to exercise any power, duty or function conferred or imposed by Lloyd's Acts 1871 to 1982 or any byelaw or regulation made thereunder—

(d) in so far as relates to the exercise of, or omission to exercise, disciplinary functions, powers and duties; or

(e) in so far as relates to the exercise of, or omission to exercise, any powers, functions or duties under byelaws made pursuant to paragraphs (21), (22), (23), (24) and (25) of Schedule 2 to this Act;

unless the act or omission complained of—

(i) was done or omitted to be done in bad faith; or

(ii) was that of an employee of the Society and occurred in the course of the employee carrying out routine or clerical duties, that is to say duties which do not involve the exercise of any discretion.

> It defies reason to suggest that a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement. A plaintiff simply would have to allege violations of *his country's* tort law or *his country's* statutory law or *his country's* property law in order to render nugatory any forum selection clause that implicitly or explicitly required the application of the law of another jurisdiction. We refuse to allow a party's solemn promise to be defeated by artful pleading. In the absence of other considerations, the agreement to submit to arbitration or the jurisdiction of the English courts must be enforced even if that agreement tacitly includes the forfeiture of some claims that could have been brought in a different forum.

Id. (citing *Roby v. Corporation of Lloyds*, No. 92-9032, 1993 WL 184568 (2d Cir. June 2, 1993). Perhaps the United States' securities laws would provide plaintiffs with a greater chance of success under lighter scienter and causation requirements. However, enforcing the clauses here simply means that plaintiffs will have to structure their case differently than if they were proceeding in federal district court. *See Riley*, 969 F.2d at 958. Given the international nature of the transactions involved here, and the availability of remedies under British law that do not offend the policies behind the securities laws, the parties' forum selection and choice of law provisions contained in the agreements should be given effect.

II. *Dismissal of the complaint as to the local defendants*

Plaintiffs next appeal the district court's *sua sponte* dismissal of the case as to the local defendants.[14] They ar-

[14] Defendant Northfield Venture Inc. is an Illinois corporation engaged in the investment business whose principal place of business is Northbrook, Illinois. Robert King is the chief executive officer of Northfield and is a resident of Glencoe, Illinois. Alan Hunken has an ownership interest in Northfield and is a resident of Northbrook, Illinois.

gue that the forum selection clause does not apply to non-contracting parties such as the American defendants. They argue that the district court's ruling is unconscionable in that it requires an Illinois plaintiff suing an Illinois defendant for acts which occurred in Illinois to bring its claim in England under English law.

A court may grant a motion to dismiss even as to non-moving defendants where the nonmoving defendants are in a position similar to that of moving defendants or where the claims against all defendants are integrally related. *Rosser v. Chrysler Corp.*, 864 F.2d 1299 (7th Cir. 1988); *Silverton v. Department of Treasury*, 644 F.2d 1341, 1345 (9th Cir.), *cert. denied*, 454 U.S. 895 (1981); *Loman Dev. Co. v. Daytona Hotel & Motel Suppliers, Inc.*, 817 F.2d 1533, 1537 (11th Cir. 1987).

Here, the plaintiffs allege that the local defendants are agents of Lloyd's and Lime Street. The Complaint alleges that the omission and misrepresentations are attributable to all defendants. Counsel for both sides agree that the parties are indispensable to each other. We thus hold that the district court did not err in determining, under *Rosser*, that the local defendants are integrally related to the moving defendants such that the suit against all defendants should be kept in a single forum. We recognize, however, that dismissal of the suit as to the local defendants could have the effect of unjustly allowing these defendants to escape suit if an English court cannot gain personal jurisdiction over them or cannot serve them with process. We thus direct that the district court to qualify its dismissal of the entire case on the condition that the local defendants agree to appear voluntarily in England if suit is refiled there.[15]

For the foregoing reasons, the judgment of the district court is affirmed.

[15] Counsel for the local defendants stated at oral argument that they would not object to such a condition.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Theodore William Grippo Jr.
Grippo & Simmons
225 W. Washington
Suite 2200
Chicago, IL 60606

Case Number 1:91-cv-05525

Title: Bonny v. Society of Lloyd's

Assigned Judge: Hononable Charles R. Norgle, Sr.

MINUTE ORDER of 8/6/93 by Hon. Charles R. Norgle Sr: The Seventh Circuit having affirmed the trial court in its order of 08/05/93, and having directed that the district court qualify its dismissal on the condition that the local defendants agree to appear voluntarily in England if suit is refiled there, the district court qualifies its order of dismissal to comply with the direction of the Seventh Circuit Court of Appeals. It is so ordered. Mailed notice.

This order was entered on the docket by the Clerk August 9, 1993

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure. It was generated by the automated docketing system being introduced to handle the civil dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Theodore William Grippo Jr.
Grippo & Simmons
225 West Washington
Suite 2200
Chicago, IL 60606

Case Number: 1:91-cv-05525

Title: Bonny v. Society of Lloyd's
Assigned Judge: Honorable Charles R. Norgle, Sr.

MINUTE ORDER of 6/26/92 by Hon. Charles R. Norgle Sr: The court's 05/29/92 order dismissing the plaintiff's amended complaint applied to all defendants. The defendants who did not move for dismissal were dismissed sua sponte under Rosser v. Chrysler Corp., 864 F.2d 1299, 1304 (7th Cir. 1988). Granting plaintiffs' motion to clarify order of 05/29/92 to that extent, and [116-1], Denying the motion as moot with regard to its request for a determination pursuant to Fed. R. Civ. P. 54(b) [116-2] Mailed notice

This order was entered on the docket by the Clerk June 29, 1992

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure. It was generated by the automated docketing system being introduced to handle the civil dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

KENNETH F. BONNY, FRANCESCA B. BONNY and ROBERT D. FLESVIG,

Plaintiffs,

v.

THE SOCIETY OF LLOYD'S, HARRIS BANK GLENCOE-NORTHBROOK, N.A., HARRIS TRUST AND SAVINGS BANK, BANK OF MONTREAL, NORTHFIELD VENTURE, INC., ROBERT B. KING, ALAN J. HUNKEN, LIME STREET UNDERWRITING AGENCIES LTD., ROBIN C. KINGSLEY, ROBERT C. HALLAM, PATRICK M. CORBETT, and BANKSIDE UNDERWRITING AGENCIES LTD.,

Defendants.

No. 91 C 5525
Honorable
Charles R. Norgle

ORDER

Before the court are the objections of plaintiffs Kenneth F. Bonny, Francesca B. Bonny and Robert D. Flesvig to Magistrate Judge Gottschall's April 20, 1992 report and recommendation that plaintiffs' amended complaint be dismissed. For reasons that follow, the report and recommendation (attached as Appendix A) is adopted and the plaintiffs' amended complaint is dismissed.

The defendants' motion to dismiss the amended complaint was referred to Magistrate Judge Gottschall pursuant to 28 U.S.C. § 636(b)(1)(B). The plaintiffs filed objections on May 4, 1992 to the Magistrate Judge's report and recommendation. Defendants Lime Street Underwriting Agencies, Ltd., Robin C. Kingsley, Robert C. Hallam, Patrick Corbett, and Bankside Underwriting Agencies, Ltd. filed a response on May 15, 1992 to the plaintiffs' objections.

Upon a magistrate judge's submission of a report and recommendation on a motion to dismiss, and the timely filing objections by a party to the proceeding, the district court must make a *de novo* determination based upon the record and may accept, reject or modify the recommended disposition. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1)(C). The court has reviewed the report and recommendation, and finds that it accurately interpreted this court's prior opinion denying the plaintiff's request for a preliminary injunction. *Bonny v. Society of Lloyd's*, 784 F.Supp. 1350 (N.D. Ill. 1992). The report and recommendation is also well-supported by the record and the applicable law. Accordingly, the report and recommendation is adopted and the defendants' motion to dismiss the amended complaint is granted.

IT IS SO ORDERED.

ENTER:

CHARLES R. NORGLE

CHARLES RONALD NORGLE, SR., Judge
United States District Court

DATED: 5/29/92

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KENNETH F. BONNY, FRANCESCA B. BONNY and ROBERT D. FLESVIG,

Plaintiffs,

v.

THE SOCIETY OF LLOYD'S, HARRIS BANK GLENCOE-NORTHBROOK, N.A., HARRIS TRUST AND SAVINGS BANK, BANK OF MONTREAL, NORTHFIELD VENTURE, INC., ROBERT B. KING, ALAN J. HUNKEN, LIME STREET UNDERWRITING AGENCIES LTD., ROBIN C. KINGSLEY, ROBERT C. HALLAM, PATRICK M. CORBETT, and BANKSIDE UNDERWRITING AGENCIES LTD.,

Defendants.

No. 91 C 5525

REPORT AND RECOMMENDATION ON DEFENDANTS' MOTONS TO DISMISS

TO THE HONORABLE CHARLES R. NORGLE, SR., one of the Judges of the United States District Court for the Northern District of Illinois.

In its Report and Recommendation issued on September 26, 1991, this court concluded that plaintiffs had shown a likelihood of success on the merits of their claim that the forum selection and choice of law clauses in their contractual undertakings with defendants should not be enforced. This court read the relevant decisions of the Supreme Court and the anti-waiver provision of the 1933 Securities Act to mean that if the combined effect of the parties' forum selection and choice of law clauses was to make it likely that plaintiffs would lose not only a judicial forum but their securities law cause of action, the clauses should not be enforced.

In rejecting this court's recommendation in his February 24, 1992 Order ("the Order"), Judge Norgle clearly rejected this court's interpretation of the governing law. Judge Norgle ruled that once it is determined that an agreement is "international," the anti-waiver provision of the 1933 Securities Act will not overcome the parties' freely-negotiated forum selection and choice of law clauses.

While Judge Norgle's decision establishes only that plaintiffs have not shown a *likelihood* of success on the merits and does not *necessarily* mean that their claims must be dismissed, this court views Judge Norgle's decision as dispositive for all practical purposes. The contracts at issue are clearly "international" in the sense described by Judge Norgle. This court believes that based upon that finding, Judge Norgle would uphold the forum selection clauses on this record.

This court might well reach this same conclusion applying its own interpretation of the relevant Supreme Court precedents. On a fuller examination of English law, it might conclude that an English forum would adequately allow plaintiffs the opportunity to vindicate their rights. It might conclude that plaintiffs' securities claims are barred by limitations, that the claims must be arbitrated or that the allegations of fraud are insufficient to disturb the integrity of plaintiffs' letters of credit. But pursuing any of these issues would be expensive and time-consuming for the parties. Since this court views Judge Norgle's analysis of the issues as dispositive of a controlling question of law raised by the motions to dismiss, it sees no good reason to delay the proceedings further. Based on Judge Norgle's order of February 24, 1992, therefore, it is recommended that the forum selections clauses of the parties' agreements be upheld, and that accordingly, the Motions to Dismiss the Amended Complaint of Defendant The Society of Lloyd's and Defendants Lime Street Underwriting Agencies Ltd., Robin C. Kingsley, Robert C. Hallam, Patrick M. Corbett and Bankside Underwriting Agencies Ltd., be granted.

Counsel are given ten days from the date hereof to file objections to this Report and Recommendation with the Honorable Charles R. Norgle, Sr. Failure to object constitutes waiver of the right to appeal.

Respectfully submitted,

JOAN B. GOTTSCHALL

JOAN B. GOTTSCHALL
United States Magistrate Judge

DATED: April 20, 1992

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

KENNETH F. BONNY, FRANCESCA B. BONNY and ROBERT D. FLESVIG,

Plaintiffs,

v.

THE SOCIETY OF LLOYD'S, HARRIS BANK GLENCOE-NORTHBROOK, N.A., HARRIS TRUST AND SAVINGS BANK, BANK OF MONTREAL, NORTHFIELD VENTURE, INC., ROBERT B. KING, ALAN J. HUNKEN, LIME STREET UNDERWRITING AGENCIES LTD., ROBIN C. KINGSLEY, ROBERT C. HALLAM, PATRICK M. CORBETT, and BANKSIDE UNDERWRITING AGENCIES LTD.,

Defendants.

No. 91 C 5525
Honorable
Charles R. Norgle

ORDER

Before the court are the objections of defendant The Society of Lloyd's ("Lloyd's") and defendants Harris Bank Glencoe-Northbrook, N.A. and Harris Trust and Savings Bank (together "Harris Bank") to Magistrate Judge Gottschall's September 26, 1991 report and recommendation (attached as Appendix A) that plaintiffs Kenneth F. Bonny and Francesca B. Bonny's (the "Bonnys") motion for a preliminary injunction be granted. For reasons that follow, the recommendation is rejected and the Bonnys' motion is denied.

FACTS

The Bonnys filed the instant lawsuit on August 30, 1991 alleging that they were fraudulently, and in violation of various federal and state securities laws, induced to become members of Lloyd's and to participate as underwriters in several insurance

syndicates marketed at Lloyd's.[1] The complaint sought damages, rescission of the Bonnys' membership agreements with Lloyd's, and an injunction barring the defendants, pending the outcome of this case, from drawing upon letters of credit issued by Harris Bank which the Bonnys were required to obtain as a condition of their Lloyd's membership.

The Bonnys filed the present motion for injunctive relief on September 3, 1991. Pursuant to 28 U.S.C. § 636(b)(1)(B), the Bonnys' motion was referred to the Magistrate Judge. Lloyd's opposition to the Bonnys' motion was limited to one issue: whether forum selection and choice of law clauses in the Bonnys' membership and agency agreements, requiring that all disputes be litigated before English courts or arbitrators under English law, deprived the court of jurisdiction.[2] Lack of jurisdiction, Lloyd's contended, would preclude a finding that the Bonnys had a reasonable likelihood of succeeding on the merits, one of the requirements for injunctive relief.

The Magistrate Judge found that the forum selection clauses should not be enforced. In reaching that conclusion, she first found that freely negotiated forum selection and choice of law clauses must be enforced, unless there were strong countervailing public policy considerations. She found such public policy considerations, however, in a ban on prospective waivers of claims under the Securities Act of 1933, 15 U.S.C. § 77n.

Although the Bonnys could pursue some of their claims in the English courts — including their common law fraud claims and their claims under the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Securities and Exchange Commission Rule 10b-5 — the Magistrate Judge found that the Bonnys might be barred there from pursuing their claims under the 1933 Act, 15 U.S.C. § 771(1), (2). Several English statutes grant various forms of civil immunity to Lloyd's. The Magistrate Judge found that at least one of those statutes could be used to bar the Bonnys'

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[1] An amended complaint was filed on November 4, 1991 adding plaintiff Robert D. Flesvig and defendant Alan J. Hunken. By stipulation, Flesvig has joined in the Bonnys' motion.

[2] Lloyd's presses the same issue in its motion to dismiss the amended complaint, currently pending before Magistrate Judge Gottschall.

claims under the 1933 Act. Additionally, even though Lloyd's and its related defendants agreed not to seek immunity from the 1933 Act claims, the Magistrate Judge found that an English court could apply the immunity on its own initiative to further English public policy. The Magistrate Judge was not dissuaded from this view by the affidavit of an English barrister submitted on Lloyd's behalf expressing the opinion that an English court would not rule on a defense not raised by Lloyd's. The affidavit further opined that relief similar to that available under the 1933 Act was available under English common law.

Lloyd's raises three objections to the Magistrate Judge's report and recommendation: (1) United States public policy is not a sufficient basis to block enforcement of an international forum selection clause, (2) Lloyd's would not be immune in England from the 1933 Act claims, and (3) even if Lloyd's could utilize such immunity, the Bonnys would lose nothing because their federal securities law claims are time-barred.

Harris Bank also objects to the issuance of a preliminary injunction, arguing that there was no finding of fraud sufficient to void the Bonnys' entire agreement with Lloyd's and that without such a finding, "the integrity of the clean, irrevocable letter[s] of credit" should not be disturbed.

DISCUSSION

The Bonnys, in order to obtain a preliminary injunction, must show all of the following: (1) a reasonable likelihood of success on the merits, (2) lack of an adequate remedy at law, (3) that they would suffer injury without an injunction greater than any injury an injunction will cause defendants, and (4) that the injunction will not harm the public interest. *S.E.C. v. Cherif*, 933 F.2d 403, 408 (7th Cir. 1991) (citing *Roland Machinery Co. v. Dresser Industries Inc.*, 749 F.2d 380, 386-89 (7th Cir. 1984)), *cert. denied*, 60 U.S.L.W. 3520 (1992). Harris Bank contends that as to injunctions against payment on letters of credit, an additional element must be shown — fraud that vitiates the whole transaction *See Warner v. Central Trust Co., N.A.*, 715 F.2d 1121, 1123 (6th Cir. 1983); *Stringer Constr. Co. v. American Ins. Co.*, 102 Ill. App. 3d 919, 922-23, 430 N.E.2d 1,4 (1st Dist. 1981).

Lloyd's focused on the first element, as did the Magistrate Judge, and this court finds that element dispositive, making it unnecessary to address the other elements. Lloyd's correctly argues that the Bonnys have no likelihood of success on the merits if the forum selections clauses would prevent the case from being heard here.

Forum selection clauses in international agreements eliminate a host of uncertainties and potential inconveniences, and for that reason are "an indispensable element in international trade, commerce and contracting." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972). "[C]oncerns of international comity [and] respect for the capacities of foreign and transnational tribunals" further supports enforcement of international forum selection clauses, regardless of whether the results would differ in a foreign court. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985). Accordingly, such clauses are given "special deference," *In re Oil Spill by the Amoco Cadiz*, 659 F.2d 789, 795 (7th Cir. 1981), and must be specifically enforced unless a challenging party can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *M/S Bremen*, 407 U.S. at 15.

The Bonnys must therefore show more than inconvenience or a diminished chance of success in England to overcome the forum selection clause. The Magistrate Judge, however, found only that the Bonnys might be unable to litigate some of their claims and might receive a lesser remedy if they win in England. The burden seems to have been put on Lloyd's rather than on the Bonnys, upon whom it belonged. The speculative nature of the harms the Bonnys might suffer cuts against them, not against Lloyd's. Moreover, it is hardly clear that such harms would be sufficient to overcome the forum selection clauses.

The Magistrate Judge found the forum selection clauses unenforceable based on dicta in a footnote in the *Mitsubishi* opinion, 473 U.S. at 637 n.19, which stated that forum selection and choice of law clauses that together constituted prospective waivers of statutory antitrust remedies would be void as against public policy. But even assuming that there is a prospective waiver of securities law remedies here, it is doubtful that such

a waiver can obviate the strong presumption of validity of the forum selection clauses. This presumption clearly applies when securities law claims are at issue, including claims under the Securities Act of 1933 and the Securites Exchange Act of 1934, both of which contain anti-waiver provision. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515-17 (1974).

The anti-waiver provision in the 1933 Act, 15 U.S.C. § 77n, was cited by the Magistrate Judge in Support of her finding that the *Mitsubishi* footnote's public policy exception should apply. That finding, however, is contrary to *Scherk* and its guidance that the nature of the contract — i.e. whether the contract was formed entirely within the United States or whether it is a truly international agreement — is the key factor. The contracts containing the forum selection clauses involve the Bonnys' membership in Lloyd's, located in London, England, and their participation in insurance syndicates marketed at Lloyd's. Negotiations over the contracts apparently took place in both Illinois, where the Bonnys reside, and in England. Therefore, without the forum selections and choice of law clauses, there could have been substantial international choice of law questions. In these circumstances, United States securities laws and the public policies they represent do not stand in the way of international forum selection clauses. *See Scherk*, 417 U.S. at 516-20. Furthermore, there is nothing in the record suggesting that England is a fundamentally unfair forum in which to litigate the Bonnys' claims. *See Carnival Cruise Lines, Inc., v. Shute*, 111 S.Ct. 1522, 1528 (1991) (fundamental fairness scrutiny of chosen forum's relation to the dispute).

In sum, the Bonnys have failed to make a sufficient showing to overcome the presumed validity of the forum selection clauses at issue. They therefore cannot show a reasonable likelihood of success on the merits as they must to obtain a preliminary injunction.

CONCLUSION

The recommendation of the Magistrate Judge is rejected, and the Bonnys' motion for a preliminary injunction is denied.

IT IS SO ORDERED.

ENTER:

CHARLES R. NORGLE

CHARLES RONALD NORGLE, SR., Judge
United States District Court

DATED: 2/24/92

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KENNETH F. BONNY and FRANCESCA B. BONNY,

Plaintiffs,

v.

No. 91 C 5525

THE SOCIETY OF LLOYD'S, HARRIS BANK GLENCOE-NORTHBROOK, N.A., HARRIS TRUST AND SAVINGS BANK, BANK OF MONTREAL, NORTHFIELD VENTURE, INC., ROBERT B. KING, LIME STREET UNDERWRITING AGENCIES LTD., ROBIN C. KINGSLEY, ROBERT C. HALLAM, PATRICK M. CORBETT, and BANKSIDE UNDERWRITING AGENCIES LTD.,

Defendants.

REPORT AND RECOMMENDATION

TO THE HONORABLE NICHOLAS J. BUA, one of the Judges of the United States District Court for the Northern District of Illinois.

This matter comes before the court on plaintiffs' motion for a preliminary injunction to enjoin The Society of Lloyd's ("Lloyd's") from drawing upon funds secured by letters of credit posted by plaintiffs and to enjoin the bank defendants from releasing such funds. The injunction is sought principally to preserve the availability of the funds in question to satisfy any judgment plaintiffs may recover in the underlying suit, in which plaintiffs charge Lloyd's and associated defendants with violations of sections 12(1) and 12(2) of the Securities Act of 1933, 15 U.S.C. §771(1), (2), section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and Rule 10b-5 of the Securities

and Exchange Commission. Pendent claims of common law fraud, breach of fiduciary duty, common law negligence, breach of contract and violation of New Jersey's blue sky laws are also asserted.

Defendants' opposition to plaintiffs' motion for a preliminary injunction has been limited to one issue: whether this court lacks jurisdiction over this controversy because the Agency Agreement and Members' Agent's Agreement, which define the parties' relationship, contain forum selection and choice of law clauses providing that English law shall govern all disputes and requiring the submission of all disputes to the exclusive jurisdiction of an English court or arbitrator.[1]

The matter was heard on that basis on September 3 and 4, and was continued until September 6 for the limited purpose of allowing defendants to present proof of English law on the question of whether the plaintiffs, if required to litigate in England, would have a remedy. On September 5, in addition to materials concerning English law, defendants submitted material suggesting that plaintiffs' claims are time-barred. Defendants maintain that if plaintiffs' claims are time-barred under U.S. law, remitting plaintiffs to whatever remedies they may have under English law cannot injure them, since they cannot prevail in an American court. As the court indicated to the parties in its oral remarks, this issue was raised by defendants too late to allow for an adequate adversary presentation within the schedule the court had ordered. While the limitations issue is a substantial one, and is relevant to the critical issue of whether plaintiffs have shown a likelihood of success on the merits, the court does not believe it is any more relevant to the issue of whether plaintiffs' claims should proceed in this forum that is any other matter of defense. If defendants wish the court to consider this issue (or any other matter relevant to the question of whether plaintiffs have shown a likelihood of success on the merits), the court will hear those issues provided adequate notice to plaintiffs and a means of insuring the maintenance of the status quo during the time necessary for the development of an adequate record.

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[1] The parties refer to this issue as "jurisdiction." It is not clear that it is in fact a jurisdictional question.

The court thus turns to the issue presented by all parties as the key question for the court's consideration on plaintiffs' motion for a preliminary injunction: whether the court should decline to act given the forum selection and choice of law clauses in the parties' agreements.

The Supreme Court has made abundantly clear in a series of recent decisions that forum selection clauses and choice of law clauses in freely negotiated contracts should be enforced, absent strong public policy reasons to the contrary. *See The Bremen v. Zapata Off-Shore Co.*, 407 U.S 1 (1972) (clause in towage contract selecting English forum should be enforced even though an English court would likely give more weight than would an American court to contractual exculpatory clauses favoring German tug owner over American rig owner); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (contractual agreement to arbitrate disputes before the International Chamber of Commerce in Paris under Illinos law should be enforced for the resolution of fraudulent misrepresentation claims under the 1934 Securities Exchange Act); *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985)(contractual provision requiring submission of disputes to arbitration in Japan, under Swiss law, held enforceable as to car dealer's Sherman Act defense to breach of contract claims); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (predispute agreement to arbitrate claims held enforceable as to claims arising under the 1933 Securities Act, overruling *Wilko v. Swan*, 346 U.S. 427 (1953)). A key consideration in many of these decisions was the Court's view that in contracts touching on multiple countries and jurisdictions, forum selection and choice of law clauses eliminate significant uncertainties and serve important policy interests. *See Carnival Cruise Lines, Inc., v. Shute*, ___ U.S. ___, 111 S. Ct. 1522, 1527 (1991). As the Court states in *Mitsubishi, supra*, "[c]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context." 473 U.S. at 629.

Despite this strong commitment to the enforcement of forum selection and choice of law provisions in international contracts, the Supreme Court has consistently cautioned that such clauses should not be enforced if enforcement would cause injustice, unfairness or a violation of important American public policy interests. The Court's willingness to sustain forum selection provisions has depended on its determination, particularly in the case of claims based on American statutory rights, that resort to the contractually-agreed upon forum will provide a means for vindicating those rights. As the Court states in *Mitsubishi*,"By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S. at 628. *See also Rodriguez de Quijas, supra*, 490 U.S. at 481.

The difficulty presented by the instant case arises out of the special position of Lloyd's and its underwriters under English law. Plaintiffs have asserted that two statutes, the English Financial Services Act of 1986 and the Lloyd's Act of 1982, immunize Lloyd's and its underwriters from liability on plaintiffs' securities claims. Plaintiffs argue that if they are compelled to litigate in England, they will be barred from any redress against Lloyd's and its underwriters.

The Financial Services Act ("FSA") appears on it face to be a comprehensive regulatory statute governing the securities industry. It contains various regulatory requirements and penalties. It also contains this provision:

Other Exemptions

§42 Lloyd's

> The Society of Lloyds' and persons permitted by the Council of Lloyd's to act as underwriting agents at Lloyd's are exempted persons as respects investment business carried on in connection with or for the purpose of insurance business at Lloyd's.

Initially, it appeared to the court, as announced orally in open court on September 6, that this section would preclude

securities actions against Lloyd's; Lloyd's was apparently exempt from regulation under the only securities legislation brought to the court's attention. Subsequent to that hearing, however, the Lloyd's defendants presented the affidavit of John Lewis Powell, an English barrister and Queen's Counsel, with a commercial law practice and expertise in the areas of financial services and professional negligence. Mr. Powell averred the following concerning the Financial Services Act:

1) The Financial Services Act of 1986 ("the FSA") establishes a system of statue-backed self-regulation of the investment business. Under section 42 of the FSA, "The Society of Lloyd's and persons permitted by the Council of Lloyd's to act as underwriting agents at Lloyd's are exempted persons as respects investment business carried on in connection with or for the purpose of insurance business at Lloyd's." According to Mr. Powell, the rationale for the Lloyd's expemption is to avoid regulatory duplication, given that Lloyd's and Lloyd's underwriting agents are regulated under the Lloyd's act of 1982. Nevertheless, certain provisions of the FSA are applicable to Lloyd's, specifically, sections 47, 56, 59 and 61.

2) Section 47 creates *criminal* penalties for misleading statements made knowingly or recklessly; a reasonable belief that words or conduct would not create a misleading impression may be raised as a defense to a section 47 charge. There are geographical limitations on the reach of section 47, requiring in essence that the misrepresentation be made in or from the United Kingdom or that the affected person be in the United Kingdom.

3) Section 56 of the FSA prohibits "unsolicited calls" and provides for various civil sanctions for the violation of its prohibitions.

4) Section 59 allows the Secretary of State of Trade and Industry to issue a disqualification directive prohibiting the Society of Lloyd's and Lloyd's underwriting agents from employing persons judged to be unfit.

5) Section 61 permits the court, on application of the Secretary of State, to enjoin the contravention or threatened contravention

of sections 47, 56 or 59 by Lloyd's or Lloyd's underwriting agents. The section appears to include, among the authorized injunctions, remedial orders for past violations and various disgorgement, restitution and compensation orders.

The Lloyd's defendants maintain that section 47 provides remedies similar to those provided by the American securities laws. This does not apepar to be the case. Mr. Powell's affidavit indicates that section 47 provides for *criminal* penalties only. Moreover, given its geographical limitations, it is doubtful that section 47 would reach misrepresentations made in the United States to United States citizens. Section 61 would appear to have no application here, given that it requires the initation of litigation by the Secretary of State.

The Lloyd's defendants point out that the "exempted person" status given to the Society of Lloyds' under the FSA does not protect Lloyd's from liabilities arising other than under the FSA. Based on §61(9) of the FSA,[2] this appears to be the case. Accordingly, the court concludes that it was in error in initially believing that the FSA exemption barred all securities actions against Lloyd's. Inasmuch as no evidence has been presented of any other statute which affirmatively provides for suit against Lloyd's, however, the court is left to conclude that plaintiffs would retain only whatever common law remedies are otherwise available under English law.

This does not end the matter. The situation is complicated by another statute, the Lloyd's act. The Lloyd's Act provides in relevant part as follows:

> *SECTION 14: Liability of the Society, etc*
> DATE-IN-FORCE: 23 July 1982
>
> (1) This Section shall only exempt the Society from liability in damages at the suit of a member of the Lloyd's community.

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[2] This section preserves other remedies.

(2) For the purposes of this section a member of the Lloyd's community shall be—

(a) a person who is—

(i) a member of the Society;

(ii) A Lloyd's broker;

(iii) an underwriting agent;

(iv) an annual subscriber;

(v) an associate;

(vi) a director or partner of a Lloyd's broker or an underwriting agent;

(vii) a person who works for a Lloyd's broker or underwriting agent as a manager; or

(b) a person who has been a member of the Lloyd's community in one or more of the capacities listed in paragraph (a) above; or

(c) a person who is seeking or who has sought to become a member of the Lloyd's community in one or more of the capacities listed in paragraph (a) above.

(3) Subject to subsections (1), (4) and (5) of this section, the Society shall not be liable for damages whether for negligence or other tort, breach of duty or otherwise, in respect of any exercise of or omission to exercise any power, duty or function conferred or imposed by Lloyd's Acts 1871 to 1982 or any byelaw or regulation made thereunder—

(a) in so far as the underwriting business of any member of the Society or the costs of his membership or the business of any person as a Lloyd's broker or underwriting agent may be affected; or

(b) in so far as related to the admission or nonadmission to, or the continuance of, or the suspension or exclusion from, membership of the Society; or

(c) in so far as related to the grant, continuance, suspension, withdrawal or refusal of permission to carry on business

at Lloyd's as a Lloyd's broker or an underwriting agent or in any capacity connected therewith; or

(d) in so far as related to the exercise of, or omission to exercise, disciplinary functions, powers and duties; or

(e) in so far as relates to the exercise of, or omission to exercise, any powers, functions or duties under byelaws made pursuant to paragraphs (21), (22), (23), (24) and (25) of Schedule 2 to this Act;

unless the act or omission complained of—

(i) was done or omitted to be done in bad faith; or

(ii) was that of an employee of the Society and occurred in the course of the employee carrying out routine or clerical duties, that is to say duties which do not involve the exercise of any discretion.

(4) Nothing in this section shall affect any liability of the Society in respect of the death of or personal injury to any person, and for the purposes of this section the expression "personal injury" means bodily injury, any disease and any impairment of a person's physical or mental condition.

(5) Nothing in this section shall exempt the Society from liability for libel or slander.

(6) For the purposes of this section "the Society" means the Society itself and also any of its officers and employees and any person or persons in or to whom (whether individually or collectively) any powers or functions are vested or delegated by or pursuant to Lloyd's Acts 1871 to 1982.

No exegesis of this statute has been provided. By its literal terms, §14 appears to exempt Lloyd's from liability in damages for any tort, breach of duty or acts or omissions related to the conduct of its business except insofar as bad faith is established. This bad faith exception would presumably save plaintiffs' fraud claims under §10(b) of the 1934 Securities Exchange Act, as well as its Rule 10b-5 and common law fraud claims. Insofar as this court can determine, however, it would exempt Lloyd's from liability for violations of the 1933 Securities Act, since liability

under §12(1) and §12(2) does not requrie proof of bad faith. *See, e.g., Wolf v. Banco Nacional de Mexico*, 549 F.Supp. 841, 853 (N.D. Cal 1982), *appeal dismissed*, 721 F.2d 660 (9th Cir. 1983); *Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 551 F.Supp. 580, 590 (S.D. Ohio 1982). Thus, from what has been presented to this court, it appears that an English court applying English law would hold Lloyd's immune from liability on plaintiffs' 1933 Act claims.

If this is the result, the court has no choice but to conclude that the choice of forum and choice of law clauses at issue cannot be enforced. The 1933 Securities Act provisions asserted by plaintiffs serve important public interests under American law. The complaint in this case asserts that defendants violated these provisions in dealing with American citizens on American soil. It is clear that permitting Lloyd's, by a forum selection clause, to avoid liability for putative violations of the 1933 Act would contravene important American public policy interests.

Moreover, the 1933 Act itself explicitly directs that if this is the effect of the plaintiffs' contracts with defendants, the contracts are void. Section 14 of the Act provides:

> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

15 U.S.C. §77n.

The Supreme Court addressed this issue in *Mitsubishi*. There, the Supreme Court ruled that if the effect of enforcing a contractual forum selection or choice of law clause is to vitiate a person's right to pursue important statutory remedies under the laws of the United States, enforcement is improper:[3]

> In addition to the clause providing for arbitration before the Japan Commercial Arbitration Association, the Sales Agreement includes a choice-of-law clause

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[3] *Mitsubishi* dealt with Sherman Act claims. The court views the U.S. public interest in the enforcement of the 1933 Securities Act to be at least as strong and perhaps stronger, given Congress' explicit command in §14 that prospective waivers of rights under the Act shall be invalid.

> which reads: "This Agreement is made in, and will be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein." The United States raises the possibility that the arbitral panel will read this provision not simply to govern interpretation of the contract terms, but wholly to displace American law even where it would otherwise apply. The International Chamber of Commerce opines that it is "[c]onceivabl[e], although we believe it unlikely, [that] the arbitrators could consider Soler's affirmative claim of anticompetitive conduct . . . to fall within the purview of this choice-of-law provision, with the result that it would be decided under Swiss law rather than the U.S. Sherman Act." At oral argument, however, counsel for Mitsubishi conceded that American law applied to the antitrust claims and represented that the claims had been submitted to the arbitration panel in Japan on that basis. The record confirms that before the decision of the Court of Appeals the arbitral panel had taken these claims under submission.
>
> We therefore have no occasion to speculate on this matter at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award. Nor need we consider now the effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinitiate suit in federal court. *We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.*

473 U.S. at 637 n.19 (emphasis added; citations omitted).

As the above-quoted language suggests, it is not certain that an English court applying English law would invoke the Lloyd's immunity in this case. It is at least theoretically possible that the court would conclude that under English choice of law principles, American law should govern the parties' dispute.

There is no evidence, however, that this would be the case, and the court has serious doubts that its is a reasonable possibility. Not only did the parties select English law, which an English court could conclude indicates an intent to be bound by English substantive law, but it appears that the protection of Lloyd's from the interference of tort-type actions not involving fraud represents a deliberate and explicit English public policy choice. The court cannot reasonably conclude, in the absence of supporting evidence, that an English court would decide the case under the 1933 Securities Act and make Lloyd's answerable to American plaintiffs in circumstances in which English plaintiffs would have no remedy. Unlike the situation confronting the Supreme Court in *Mitsubishi*, no one has given this court reason to believe that plaintiffs' claims would be submitted to an English court on the basis of American statutory law.[4]

For the above reasons, the court concludes that plaintiffs have shown a likelihood of success on the merits on the issue of plaintiffs' right to bring suit in this court.

With respect to irreparable injury, the issue is straightforward. If defendants are permitted to withdraw the funds secured by plaintiffs' letters of credit, will plaintiffs lose the possibility of a remedy for their 1933 Act claims? Given the conclusion that it is likely that plaintiffs will prevail on the merits of their jurisdictional argument and be permitted to proceed to trial here, the question becomes whether a judgment in plaintiffs' favor on those claims would be enforced by an English court. The court explicitly put this issue to defendants, making clear its view that if the answer were in the affirmative, it would recommend the denial of plaintiffs' motion given the balance of harms and public interests involved. Defendants did not offer any evidence concerning English law on the enforcement of foreign judgments, either in general or in the specific case of

[4] Because it appears that Lloyd's immunity represents an important English public policy choice, the court is not convinced that the Lloyd's defendants' agreement not to "argue that [plaintiffs' 1933 Act claims] fall within the provisions of §14 of the Lloyd's Act" adequately assures that the rights sought to be vindicated by the 1933 Act will be adequately protected by an English court. Defendants implicitly suggest that Lloyd's statutory immunity is waiveable. But if the Lloyd's immunity represents English public policy, it is unlikely that a court would disregard it, whether it was argued by Lloyd's or not.

judgments that might contravene English public policy. The court is thus compelled to conclude that the funds plaintiffs seek to freeze are the only funds likely to be available to satisfy a judgment in plaintiffs' favor. In the court's view, losing all possibility of monetary recompense is substantial irreparable injury.

The court has previously discussed the balance of harms and public policy interests that weigh in the balance here. (See transcript of September 4 at 104-106; transcript of September 6 at 158-159). Briefly summarized, while Lloyd's will not be seriously injured by a delay in the transmission of the approximately $400,000 in question, the injunction sought by plaintiffs, if granted, would render uncertain Lloyd's ability to call on its names' funds, an essential aspect of its venerable way of doing business. The introduction of delay and uncertainty into Lloyd's ability to call upon the funds required to make good on its obligations would be extremely damaging to its manner of doing business.

In addition, there are significant public policy interest which militate against injunctive relief in this case. They were well-stated by the Supreme Court in *Mitsubishi, see* page 4, *supra*, and need not be repeated here. This court, however, concludes that these interests must yield to Congress' explicit directive that a contractual provision which has the effect of binding plaintiffs to waive compliance with the 1933 Securities Act is void. 15 U.S.C §77n. Further, the Supreme Court in *Mitsubishi*, even in the absence of such an explicit congressional directive, made clear that where choice of forum and choice of law clauses operate in tandem as a prospective waiver of a party's right to pursue statutory remedies under American law, such clauses must be condemned as contrary to American public policy.

On the basis of the issues presented to this court, it is accordingly recommended that plaintiffs' motion for a preliminary injunction be granted. If, however, the court is

assured that the status quo will be maintained pending the hearing of defendants' arguments relating to limitations, it would be this court's recommendation that any decision on plaintiffs' motion be deferred pending the resolution of the limitations issue.[5]

Counsel are given ten days from the date hereof to file objections to this Report and Recommendation with the Honorable Nicholas J. Bua. Failure to object constitutes waiver of the right to appeal.[6]

Respectfully submitted,

JOAN B. GOTTSCHALL

JOAN B. GOTTSCHALL
United States Magistrate Judge

DATED: September 26, 1991

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[5] While the court is sympathetic to defendants' desire to avoid entry of an injunction if there is a legitimate basis for that result, defendants' request that the court proceed to consider issues not initially presented is potentially unfair to the plaintiffs. If defendants wish to put the plaintiffs to their proof on issues other than the choice of forum and choice of law clauses, contrary to what the court understands to have been the parties' initial mutual understanding, plaintiffs must have notice of defendants' change of position and an opportunity to be heard. In the present posture of the case, the court would have to address defendants' limitations argument without any inpurt from plaintiffs.

[6] The district court should be aware that the disctrict court in Colorado recently reached a contrary decision. *Riley v. Kingsley Underwriting Agencies, Ltd., et al.*, No. 91 C. 1411 (Aug. 30, 1991). This court has read the transcript of those proceedings. It does not appear that the court considered the conflict between the Lloyd's Act immunity and the non-fraud causes of action of the 1933 Act.

No. 93-910

Supreme Court, U.S.
FILED
JAN 6 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

KENNETH F. BONNY, et al.,

Petitioners,

v.

THE SOCIETY OF LLOYD'S, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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(For Further Appearances See Reverse Side of Cover)

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COUNTER QUESTION PRESENTED

Whether this Court's unbroken line of precedents favoring enforcement of choice of forum and choice of law clauses in international agreements warranted dismissal by the courts below of Petitioners' purported federal securities law claims against the Society, Corporation, Committee and Council of Lloyd's of London, their Members' Agent at Lloyd's, three English employees of that Members' Agent, three banks against whom petitioners concede no wrongdoing was alleged, and three U.S. citizens who suggested that petitioners go to England and become members engaging in the underwriting of insurance business at Lloyd's.

STATEMENT PURSUANT TO RULE 29.1

Respondents The Society of Lloyd's, Lime Street Underwriting Agencies, Ltd., a British corporation, and Bankside Underwriting Agencies, Ltd., a British corporation, Bank of Montreal, a Canadian corporation, and Northfield Venture, Inc., an Illinois corporation, have no parent or subsidiary corporation within the meaning of Rule 29.1 of the Rules of the Supreme Court of the United States.

Respondents Harris Bank Glencoe-Northbrook and Harris Trust & Savings Bank are subsidiaries of Harris Bankcorp, Inc.

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COUNTERSTATEMENT OF THE CASE

This case arises out of the same operative facts which provided the basis for the complaints in *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.) *cert. denied*, ___ U.S. ___, 113 S. Ct. 658 (1992) and *Roby v. The Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 385 (1993). Those cases dismissed the same causes of action brought by other American[1] Names who signed the same contracts, with the same forum-selection clauses, and joined many of the same syndicates as petitioners; this Court in recent months denied petitions for *certiorari* in those cases.

Indeed, this case is peculiarly intertwined with its two companion cases where *certiorari* has been denied. Petitioners herein claim that their agent was one Robin Kingsley, who had allegedly solicited the plaintiff in *Riley*, and was a named defendant in that action. Respondent Hunken, who is a Name at Lloyd's and by whom petitioners were allegedly solicited, was a plaintiff in *Roby*. Respondents, accordingly, incorporate the statements of fact in the opinions below, and in the opinion of the Tenth Circuit in *Riley*, 969 F.2d at 955-56, and the Second Circuit in *Roby*, 996 F.2d at 1357-58.

There is no question that the petitioners' claims constitute a dispute "arising out of and relating to [their] membership of, and or underwriting of insurance business at, Lloyd's. . . . " It is conceded that petitioners had agreed in writing in England to submit such claims to English fora.

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[1] Petitioner Francesca B. Bonny is British.

REASONS FOR DENYING THE PETITION

I.

There Is No Conflict Among The Circuit Courts

The decision below follows this Court's consistent holdings and the consequent decisions of the circuit courts. Petitioners seek review of jurisprudence as to which *certiorari* has been repeatedly denied. There simply are no new issues requiring review by this Court.

Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 658 (1992), and *Roby v. The Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 385 (1993), dismissed the same causes of action by American Names who signed the same contracts, and joined many of the same syndicates, as petitioners. *Hirsch v. Oakeley Vaughan Underwriting Ltd. and the Society, Council, and Corporation of Lloyd's*, No. 89-2563, unpublished slip opinion (5th Cir. May 31, 1989), *cert. denied*, 498 U.S. 981 (1990), dismissed, in a case that arose from activities prior to the time when all of the forum selection clauses at issue here were included in membership contracts, a similar action by a Name against Lloyd's on grounds of *forum non conveniens*.[2]

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[2] Ordinary *forum non conveniens* considerations, which dictate dismissal in favor of the courts of a foreign country, apply equally to actions brought under the United States securities laws. *Howe v. Goldcorp. Inves., Ltd.*, 946 F.2d 944 (1st Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1172 (1992). The court below correctly held, *a fortiori*, that international contractual agreements to achieve the same result should be honored.

Including this case, the three circuit courts of appeal which have examined the same fact pattern pleaded herein and the same legal arguments proffered herein[3] uniformly – without so much as a single dissenting or even concurring opinion – have enforced petitioners' contractual undertakings to utilize exclusively court proceedings or arbitration in England for any dispute arising out of or relating to their membership or underwriting at Lloyd's. Each court has applied the clearly articulated jurisprudence of this Court to the unique facts presented by the contractual participation of foreign underwriters in the Lloyd's insurance market.

When petitioners entered a commercial relationship by becoming insurance underwriters, they and Lloyd's agreed with one another that their respective rights and obligations would be "governed by and construed in accordance with the laws of England," and that any dispute would be settled in "the courts of England." Petitioners' agreements with their Members' Agent contained substantially identical clauses designating English courts and law.[4] These Choice Clauses were an integral part of a

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[3] The statutory bases for each action were essentially the same:

Riley	Roby	Petitioners
15 U.S.C. § 77m	15 U.S.C. § 77m	15 U.S.C. § 77m
15 U.S.C. § 78 cc(a)	15 U.S.C. § 78 cc(a)	15 U.S.C. § 78
State Blue Sky Laws	15 U.S.C. § 77 (1)-(7)	State Blue Sky Laws

[4] Here, as petitioners acknowledge (*see* Petition at 6), petitioners' contracts with their Members' Agent contained clauses requiring arbitration in England in addition to the exclusive forum selection and choice of law clauses. The Tenth Circuit in *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 658 (1992) relied on these exact clauses in the same contracts (in standard form as required by Lloyd's byelaw) with the same Members' Agent as an additional

bargain which petitioners enjoyed for a number of years, and now seek to repudiate. Attempts to evade such clauses have been thoroughly considered and solidly rebuffed by this Court in *M/S The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) and in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). *Accord, Interamerican Trade Corp. v. Companhia Fabricadoria de Pecas*, 973 F.2d 487 (6th Cir. 1992).

The text of the relevant paragraph from petitioners' General Undertaking with Lloyd's is illustrative of petitioners' agreements, and can be found in the opinion of the Seventh Circuit at page 4a of the *Petition*, n.4: "Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to [petitioner's] membership of, and/or underwriting of insurance business at, Lloyd's."

The Seventh Circuit's decision below, involving the same forum selection provisions enforced by the courts in *Riley* and *Roby*, cases where this Court has already denied *certiorari*, confirms that there are no new issues requiring review by this Court. Having carefully reviewed this Court's decisions in *Bremen, Scherk, Mitsubishi Motors* and *Carnival Cruise Lines*, and the singular factual details of the arrangements by which an individual obtains the

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ground to dismiss, citing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 3 (1970), and the Federal Arbitration Act, 9 U.S.C. § 201 *et seq.* 969 F.2d at 958-60. The courts here never had occasion to reach this question, finding the forum selection clauses more than sufficient to justify dismissal.

right to participate in insurance underwriting at Lloyd's, the Seventh Circuit came to the same correct result:

> In the present case, we are satisfied that several remedies in England vindicate plaintiffs' substantive rights while not subverting the United States policies of insuring full and fair disclosure by issuers and deterring the exploitation of United States investors.

Petition at 9a. Contrary to petitioners' strained argument (*Petition* at 8-10), slight differences in the phraseology of the three circuit court opinions do not create a "conflict" at all, let alone one remotely worthy of this Court's attention, when all three courts have, without a single dissenting or even concurring opinion, enforced the same contractual forum selection clauses on essentially the same reasoning.

Most of petitioners' other purported reasons for *certiorari* hardly deserve mention. It would be an absurd waste of this Court's time to write a discourse on all the possible meanings of "international" (*see Petition* at 10-12), when no court has expressed the slightest doubt that the relationship of U.S. Names with Lloyd's is "truly international." No other conclusion is possible. Petitioners also argue that the Seventh Circuit went farther than any other court in dismissing their securities law claims to England. *Petition* at 13. That is just not so: the Seventh Circuit's opinion adopts wholesale the analysis of the Second Circuit in *Roby*, and quotes with approval the Tenth Circuit's opinion in *Riley*. *Petition* at 9a-12a. In fact, there is nothing at all new in the Seventh Circuit's opinion.

Petitioners also neglect to tell the Court that, in fact, in the view of the Securities and Exchange Commission, they will lose little by being forced to honor their

agreements to resolve their grievances in England because their securities theories have no merit even under American law. The SEC has determined that if any "security" is involved in petitioners' underwriting of insurance at Lloyd's, compliance with Regulation D (governing limited offerings to qualified investors) meant that no registration would be required. *See* Commission letter, attached hereto as Respondents' Appendix A. That disposes of petitioners' § 12(1) claims. Moreover, if the SEC's definition of the relevant "security" is accepted, petitioners' § 12(2) claims would all be barred by statutes of limitations. Petitioners' "loss" of these claims is thus illusory, and is no more a reason for *certiorari* than it was in *Riley* or *Roby*.

II.

The Non-Moving Defendants' Agreement to Submit to English Jurisdiction is Commonplace and Does Not Warrant Review

Petitioners suggest that *certiorari* is appropriate, under the Supreme Court's supervisory powers, as applied to the "Local Defendants" because the Seventh Circuit directed the District Court to qualify its dismissal order. The "Local Defendants" are, in essence, two Americans (and a company they owned) petitioners claim acted as "agents" of their Members' Agent in the process leading up to petitioners becoming Names at Lloyd's. *See Petition* at 13a. Contrary to Petitioners' characterization, the Seventh Circuit opinion did not "conditionally affirm" the District Court. The clear language of the opinion states, " . . . that judgment of the district court is affirmed." *Id.* at 13a. Thus, the Court dismissed the Amended Complaint naming the Local Defendants along

with the nine other Defendants whose motions to dismiss were granted.[5] Engaging in a *de novo* review of the record, the Seventh Circuit determined that where, as here, claims against non-moving defendants and moving defendants are integrally related, common treatment should apply. Consistent with that position, the Court held that suit against all Defendants should be kept in a single forum. *Id.*, citing *Rosser v. Chrysler Corp.*, 864 F.2d 1299 (7th Cir. 1988); *Silverton v. Department of Treasury*, 644 F.2d 1341 (9th Cir.), *cert. denied*, 454 U.S. 895 (1981); *Loman Dev. Co. v. Daytona Hotel & Motel Suppliers, Inc.*, 817 F.2d 1533 (11th Cir. 1987).

The Seventh Circuit correctly affirmed the District Court ruling that the claims of Local and English Defendants were integrally related. The ruling was based, in part, upon petitioners' own allegations that the Local Defendants were agents of the English Defendants, and that the alleged misrepresentations were attributable to all Defendants. *Petition* at 13a.[6] The *Petition* reiterates this same theme, " . . . the Local Defendants, the Lime Street

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[5] The Bank Defendants' "participation" in the underlying transactions and their inclusion as defendants in this suit related solely to the letters of credit issued at plaintiffs' request. In the action below, plaintiffs sought to enjoin the Banks from paying on the letters of credit. Inasmuch as draws have been made on those letters of credit during the pendency of the appeals, the claims against the Bank Defendants are now essentially moot.

[6] The Amended Complaint alleges (at ¶ 40) that the Local Defendants "were at all relevant times agents of Lloyd's and Lime Street."

Defendants and Lloyd's made a host of misrepresentations to [petitioners] and failed to disclose a host of material facts and risk factors . . . Lloyd's was fully aware of the activities of these American recruiters, and both required and received reports from the Local Defendants concerning the recruitment and their compensation." *Petition* at 5. Since there is no dispute that the claims against the Local Defendants were integrally related to those against the English Defendants, it would have been inconsistent to permit piecemeal litigation for activities uniquely English, and which the petitioners had agreed at the outset (when prospects of profits existed) to pursue in England.

Petitioners cannot complain about the court's conditioning this dismissal upon those defendants agreeing to appear voluntarily in England if suit is refiled there. *Id.* at 13a.[7]

Defendants agreed to do so during oral argument (*id.*), thus satisfying the qualification imposed by the court. Petitioners have not yet commenced any suit in England against these defendants in which the latter could appear. Indeed, unlike thousands of their fellow

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[7] The requirement of an available alternative forum "ordinarily . . . will be satisfied when the defendant is amenable to process in the other jurisdiction." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981). This requirement is satisfied when the defendant consents to appear in the foreign forum. *Contact Lumber Co. v. P. T. Moges Shipping Co., Ltd.*, 918 F.2d 1446, 1450 (9th Cir. 1990). Much more elaborately conditioned dismissals requiring action abroad are the norm. *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, and cases listed at 984 (2d Cir. 1993).

Names, they have apparently not commenced suit in England against anyone.

The Seventh Circuit's commonsensical procedural decision that, since the alleged representations of these three defendants were attributable to their English principals, "the suit against all defendants should be kept in a single forum" (*Petition* at 13a), hardly raises any issue warranting review by *certiorari*.

CONCLUSION

The petition for *certiorari* should be denied.

Respectfully submitted,

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[Seal]

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
EXECUTIVE DIRECTOR

Stop 2-6

October 11, 1991

Taylor R. Briggs, Esq.
LeBoeuf, Lamb, Leiby & MacRae
520 Madison Avenue
New York, New York 10022

RE: FOIA #91-1351

Dear Mr. Briggs:

This is in response to your letter dated October 3, 1991, and received in this Office on October 4, 1991, in which you request access to a letter from Ms. Mary E.T. Beach to Don J. Pease concerning Lloyd's of London's solicitation of American citizens to become participants in Lloyds, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. 552. We have identified the responsive letter and made a determination to grant access. A copy of the letter is enclosed. If you have any questions, please contact Arleta D. Cunningham of my staff at (202) 272-3651

Sincerely,

[Hannah R. Hall]

Hannah R. Hall
FOIA/Privacy Act Branch Chief

Enclosure

[Seal]

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

August 5, 1991

CHAIRMAN'S OFFICE
MAILED
AUG 5 1991

The Honorable Don J. Pease
United States House
of Representatives
2410 Rayburn Building
Washington, D.C. 20515

Signed by: _____

Re: Lloyd's of London

Dear Congressman Pease:

I have been asked to respond to your letter of June 20, 1991 in which you ask certain questions pertaining to a letter you received from one of your constituents, Mr. John Steiner Roby. Mr. Roby's letter concerns the solicitation of American citizens to become participants in Lloyd's of London ("Lloyd's") by becoming Names, and the subsequent losses of those who become Names.

Before we address your specific questions perhaps it would be helpful if we briefly described the unique structure of Lloyd's, as it is not an insurance company in the manner of a typical U.S. insurance company. There are three basic components of Lloyd's. First is Lloyd's itself ("Lloyd's") which is not a company but rather an insurance marketplace at which individuals conduct separate insurance underwriting businesses. The second component is the Corporation of Lloyd's, whose sole function is to provide the premises, administrative staff and support services. The third component is the Council of Lloyd's

(the "Council") which is the body charged with regulating the entire Lloyd's structure. The individuals who comprise Lloyd's, called "Members" or "Names", conduct their underwriting business exclusively through "Members' Agents". All Members must be elected to their memberships by the Council and must be sponsored by two other members. All of a Member's underwriting business at Lloyd's is conducted pursuant to a standard Agency Agreement with the Members' Agent. The Agency Agreement grants the Members' Agent continuing authority to conduct the Members' underwriting business, including accepting risks and effecting reinsurance, collecting all premiums due the Member, and paying all liabilities and other obligations of a Member. In essence, a Member delegates complete control of his affairs to the Members' Agent and the Member may take no part in the day-to-day business. The Members' Agent exercises virtually complete control over Members' syndicate participation. Finally, the active insurance underwriters at the end of the chain are principals or employees of "Managing Agents", which are U.K. Corporations or partnerships approved by the Council to accept insurance risks at Lloyd's. Managing Agents are either also Members' Agents or are the agents of such Members' Agents.

Your first question is whether there is any regulation of Lloyd's solicitation of participations in the United States. The staff of the Commission's Division of Corporation Finance has had discussions on two occasions with Lloyd's concerning the applicability of the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act") to the solicitation of

U.S. Citizens to participate in Lloyd's. It is the Division's position that the solicitation of participations involves the sale of a security, with the issuer of that security being the particular Members' Agent involved. Accordingly, such U.S. sales would be subject to all of the provisions of the Securities Act and the Exchange Act, including the anti-fraud provisions. At the time of those prior discussions, it was determined that if the Members' Agents solicited participations in accordance with the procedures proposed by Lloyd's counsel (an offering structure intended to comply with the Commission's Regulation D), registration under the Securities Act would not be required. However, in light of the issues raised by Mr. Roby and others, the staff may consider whether the actions of Members' Agents were consistent with the earlier representations of counsel and whether further action is appropriate.

Your second question is whether the participations in Lloyd's are analogous to partnerships and what regulations apply to those types of investments. While Lloyd's participations do more closely resemble general partnership interests than they do other securities, such as shares of common stock, they are quite unique investments. For example, they may only be held by individuals, they are not transferable, even under the laws of descent and distribution, and the liability thereunder is unlimited although no Name is liable for the "share" of other Names. There is no existing precedent as to whether Lloyd's participations are securities but, as was pointed out above, the Division of Corporation Finance believes

they are securities and as such are subject to the provisions of the Federal securities laws in the same manner and to the same extent as more conventional securities.

Finally, you ask whether U.S. participants in Lloyd's properly can obtain venue in litigation against Lloyd's in the United States. Your constituent asserted that litigation against Lloyd's in the United States has been terminated as not being properly venued. We are not aware of the litigation to which your constituent refers, although it may involve a cause of action outside the Federal securities laws. However, subject to certain limitations and conditions, the provisions of the Federal securities laws generally are as applicable to the sales of foreign securities (including participations in Lloyd's) in the United States as they are to the sales of domestic securities.

I hope that the above material will be helpful in responding to your constituent's concerns. If you have any further questions, please do not hesitate to contact me.

Sincerely,

Mary E. T. Beach
Senior Associate Director